

This Opinion is Not a  
Precedent of the TTAB

Mailed: February 8, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Mushroom Revival LLC*  
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Serial No. 88419682  
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Richard D. Getz of Getz Balich LLC for Mushroom Revival LLC.

John E. Michos, Trademark Examining Attorney, Law Office 118,  
Michael Baird, Managing Attorney.

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Before Bergsman, Larkin, and Johnson,  
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

Mushroom Revival LLC (“Applicant”) seeks registration on the Principal Register of the standard-character mark MUSHROOM REVIVAL (MUSHROOM disclaimed) for goods ultimately identified as “Mushroom based dietary supplements in the form of capsules, liquid, powder,” in International Class 5.<sup>1</sup>

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<sup>1</sup> Application Serial No. 88419682 was filed on May 7, 2019 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant’s claim of first use of the mark and first use of the mark in commerce at least as early as March 1, 2018.

The Trademark Examining Attorney has refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that it so resembles the standard-character mark REVIVAL., registered on the Principal Register for "Nutritional and dietary supplements which contain vitamins, minerals and herbs; vitamin and mineral preparations for use as ingredients in the food industry,"<sup>2</sup> in International Class 5, as to be likely, when used in connection with the goods identified in the application, to cause confusion, to cause mistake, or to deceive.

When the Examining Attorney made the refusal final, Applicant appealed and requested reconsideration, which was denied. Applicant and the Examining Attorney have filed briefs.<sup>3</sup> We affirm the refusal to register.

#### **I. Record on Appeal<sup>4</sup>**

The record on appeal, which was made almost entirely by the Examining Attorney, includes Applicant's specimen of use;<sup>5</sup> USPTO electronic records regarding the cited registration;<sup>6</sup> Internet webpages regarding the nutritional value of

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<sup>2</sup> The cited Registration No. 3278425 issued on August 14, 2007 and has been renewed. As discussed further below, a period appears after the word REVIVAL in the drawing of the mark in the cited registration. We will display the cited mark in that manner in this opinion.

<sup>3</sup> Citations in this opinion to the briefs refer to TTABVUE, the Board's online docketing system. *See New Era Cap Co. v. Pro Era, LLC*, 2020 USPQ2d 10596, at \*2 n.1 (TTAB 2020). The number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear. Applicant's brief appears at 6 TTABVUE and the Examining Attorney's brief appears at 8 TTABVUE.

<sup>4</sup> Citations in this opinion to the application record, including the request for reconsideration and its denial, are to the electronic version of pages in the Trademark Status & Document Retrieval ("TSDR") database of the United States Patent and Trademark Office ("USPTO").

<sup>5</sup> May 7, 2019 Application at TSDR 3.

<sup>6</sup> July 22, 2019 Office Action at TSDR 3-5.

mushrooms and nutritional supplements containing mushroom;<sup>7</sup> and Internet webpages regarding the sale of different types of nutritional supplements, including supplements containing mushrooms.<sup>8</sup>

## II. Analysis of Refusal

Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), prohibits the registration of a mark that “[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.” Our determination of the likelihood of confusion under Section 2(d) is based on an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”). We consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

“In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services.” *Chutter, Inc. v. Great Mgmt. Grp., LLC*, 2021 USPQ2d 1001, at \*29 (TTAB 2021), *appeal docketed*, No. 22-1212 (Fed. Cir. 2021) (citing *In re Chatam Int’l Inc.*, 380 F.3d

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<sup>7</sup> *Id.* at TSDR 8-30.

<sup>8</sup> November 29, 2021 Final Office Action at TSDR 2-12; May 13, 2022 Denial of Request for Reconsideration at TSDR 2-19.

1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976)).

Applicant agrees that these two *DuPont* factors “are key considerations in any likelihood of confusion determination,” 6 TTABVUE 4, and devotes most of its appeal brief to them. *Id.* at 4-11. Applicant also invokes the fourth *DuPont* factor, the “conditions under which and buyers to whom sales are made, i.e. ‘impulse’ vs. careful, sophisticated purchasing,” 6 TTABVUE 11 (quoting *DuPont*, 177 USPQ at 567, the sixth *DuPont* factor, the “number and nature of similar marks in use on similar goods,” *id.* at 7 (quoting *DuPont*, 177 USPQ at 567), and the eighth *DuPont* factor, the “length of time during and conditions under which there has been concurrent use without evidence of actual confusion.” *DuPont*, 177 USPQ at 567. 6 TTABVUE 11.

**A. Similarity or Dissimilarity of the Goods, Channels of Trade, and Classes of Consumers**

We begin with the second and third *DuPont* factors, which “respectively consider ‘[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration,’ and ‘the similarity or dissimilarity of established, likely-to-continue trade channels.’” *Sabhnani v. Mirage Brands, LLC*, 2021 USPQ2d 1241, at \*19 (TTAB 2021) (quoting *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051-52 (Fed. Cir. 2018) (quoting *DuPont*, 177 USPQ at 567)). We also discuss “the portion of the fourth *DuPont* factor that addresses the ‘buyers to whom sales are made.’” *Id.* (quoting *DuPont*, 177 USPQ at 567).

“The goods need not be identical, but ‘need only be related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise

to the mistaken belief that they emanate from the same source.” *In re Embiid*, 2021 USPQ2d 577, at \*22 (TTAB 2021) (quoting *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 191 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007))).

“Evidence of relatedness may include news articles or evidence from computer databases showing that the relevant goods are used together or used by the same purchasers; advertisements showing that the relevant goods are advertised together or sold by the same manufacturer or dealer; or copies of prior use-based registrations of the same mark for both applicant's goods and the goods listed in the cited registration.” *Embiid*, 2021 USPQ2d 577, at \*22-23. In addition, “[t]he application and registration themselves may provide evidence of the relationship between the [goods].” *Monster Energy Co. v. Lo*, 2023 USPQ2d 87, at \*14 (TTAB 2023) (citations omitted). *See also In re Country Oven, Inc.*, 2019 USPQ2d 443903, at \*6 (TTAB 2019) (finding that “the identifications in the application and registration themselves support finding the goods and services are related.”). We “begin with the identifications of goods . . . in the registration and application under consideration.” *Id.*, at \*5.

The goods identified in the cited registration include “Nutritional and dietary supplements which contain vitamins, minerals and herbs,” while the goods identified in the application are “Mushroom based dietary supplements in the form of capsules, liquid, powder.” On the face of the two identifications, the involved goods are both “dietary supplements” with certain identified characteristics.

We must construe the identification of “dietary supplements which contain vitamins, minerals and herbs” in the cited registration as broadly as reasonably possible. *In re Solid State Design Inc.*, 125 USPQ2d 1409, 1413 (TTAB 2018). The “dietary supplements” identified in the registration “contain vitamins, minerals and herbs,” but we do not read that latter language to be an exclusive list of ingredients, to exclude mushrooms as an ingredient,<sup>9</sup> or to exclude the sale of the goods “in the form of capsules, liquid, [or] powder,” the forms in which the “dietary supplements” in the application are identified as being sold.

The “dietary supplements” in the application are “mushroom based,” but we similarly do not read that language to exclude “vitamins, minerals and herbs” as additional ingredients together with mushrooms. Applicant’s own identification of goods began simply as “Dietary supplements in the form of capsules, liquid, powder,”<sup>10</sup> and in connection with its narrowing amendment to the ultimate identification, Applicant stated that its “products consist **primarily** of mushroom ingredients in its supplements.”<sup>11</sup>

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<sup>9</sup> Applicant “note[s] that the registrant’s website (www.soy.com) reveals that the registered mark is used exclusively with soy products.” 6 TTABVUE 9. The Examining Attorney previously also cited a registration of REVIVAL that covered “Soybean-derived dietary supplement,” July 22, 2019 Office Action at TSDR 2, but that registration was cancelled, and the final refusal to register was limited to the cited registration for “dietary supplements which contain vitamins, minerals and herbs,” which are not limited to soybean-derived supplements. November 29, 2021 Final Office Action at TSDR 1. The registrant’s website cited by Applicant is not in the record, but even if it were, Applicant cannot restrict the broad identification of goods in the cited registration at issue on this appeal by extrinsic evidence of the actual use of the mark. *See, e.g., Embiid*, 2021 USPQ2d 577, at \*28 & n.38.

<sup>10</sup> May 7, 2019 Application at TSDR 1.

<sup>11</sup> August 24, 2019 Response to Office Action at TSDR 1 (emphasis added). The record shows that mushrooms are a recognized source of vitamins and minerals. July 22, 2019 Office Action at TSDR 8-17 (MEDICAL NEWS TODAY article at medicalnewstoday.com discussing the

As noted above, we must read the identification of “dietary supplements which contain vitamins, minerals and herbs” in the cited registration as broadly as possible “to include all ‘goods of the nature and type described therein,’” *Solid State Design*, 125 USPQ2d at 1413 (quoting *In re Jump Designs LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006)), and although we believe that the identification is clear, we must resolve any ambiguity in the identification in favor of the cited registrant “given the presumptions afforded the registration under Section 7(b)” of the Trademark Act. *In re C. H. Hanson Co.*, 116 USPQ2d 1351, 1355 (TTAB 2015) (citing 15 U.S.C. § 1057(b)). Applying these rules of interpretation, we hold that the goods identified in the cited registration as “dietary supplements which contain vitamins, minerals and herbs” encompass the goods identified in the application as “Mushroom based dietary supplements in the form of capsules, liquid, powder” because the goods identified in the application are a mushroom-based subset of the “dietary supplements which contain vitamins, minerals and herbs” identified in the cited registration. *See Solid State Design*, 125 USPQ2d at 1413 (finding that the identification of goods in the cited registration, “Downloadable mobile applications for mobile phones and mobile electronic devices, primarily software for travel and destination marketing organizations and travel marketing professionals,” must be deemed “to include all ‘goods of the nature and type described therein’ . . . which encompass Applicant’s more specifically identified type of [c]omputer application

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nutritional value of mushrooms); May 13, 2022 Denial of Request for Reconsideration at TSDR 10 (displaying capsules touting the presence of “Vitamin D from Organic Mushrooms”).

software for mobile phones.”) (citation omitted). The goods identified in the cited registration and the application are thus legally identical, and the second *DuPont* factor “strongly supports a finding of a likelihood of confusion.” *In re Medline Indus., Inc.*, 2020 USPQ2d 10237, at \*4 (TTAB 2020).

“Because the [goods] described in the application and the [cited] registration are legally identical . . . we must presume that the channels of trade and classes of purchasers are the same as to those legally identical [goods].” *Monster Energy*, 2023 USPQ2d 87, at \*17 (citing *In re Viterra Inc.*, 671 F.3d 138, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012)). As a result, “[t]he third *DuPont* factor and the portion of the fourth *DuPont* factor regarding the buyers to whom sales are made thus also strongly support a finding of a likelihood of confusion . . . .” *Sabhnani*, 2021 USPQ2d 1241, at \*21.

### **B. Similarity or Dissimilarity of the Marks**

The involved marks are MUSHROOM REVIVAL and REVIVAL. in standard characters. “Under the first *DuPont* factor, we consider ‘the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.’” *Embiid*, 2021 USPQ2d 577, at \*11 (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005)).<sup>12</sup> “Similarity in any one of these elements may be sufficient to

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<sup>12</sup> As noted above, a period appears after the word REVIVAL in the cited mark. “Punctuation, such as quotation marks, hyphens, periods, commas, and exclamation marks, generally does not significantly alter the commercial impression of the mark.” *Peterson v. Awshucks SC, LLC*, 2020 USPQ2d 11526, at \*15-16 (TTAB 2020) (quotation omitted). Applicant appears to

find the marks confusingly similar.” *Id.* (quoting *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019) (quoting *In re Davia*, 110 USPQ2d 1801, 1812 (TTAB 2014)).

“The proper test regarding similarity ‘is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *Embiid*, 2021 USPQ2d 577, at \*11. (quoting *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (internal quotation omitted)). “The proper perspective on which the analysis must focus is on the recollection of the average customer, who retains a general rather than a specific impression of marks.” *Id.* (quoting *In re i.am.symbolic, llc*, 127 USPQ2d 1627, 1630 (TTAB 2018)). The average customers here are consumers of dietary supplements, which include members of the general public.

Applicant argues that its “mark MUSHROOM REVIVAL and the cited mark REVIVAL include a single common term. In the present mark, the common term REVIVAL is the second term and in [the] cited mark the common term REVIVAL is the only term. In terms of appearance, therefore, the present application has two terms and the cited mark has a single term.” 6 TTABVUE 5. According to Applicant, “[t]his difference by itself points to a dissimilarity in appearance between the marks.” *Id.* at 6. Applicant also suggests that MUSHROOM, not REVIVAL, should be deemed

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agree because it identifies the “Cited mark” in its brief as REVIVAL without a period, 6 TTABVUE 4, and never uses a period when it displays the cited mark in its brief. *Id.* at 5-9.

the more significant portion of its mark for purposes of comparison of the marks in appearance because it is the first portion of the mark and because

the term REVIVAL as used in applicant's mark and the cited mark is highly suggestive and therefore should be given lesser weight in the LOC analysis. The lesser weight of the suggestive term REVIVAL and its secondary position relative to MUSHROOM within applicant's mark support a finding that the marks are in fact dissimilar when considered in their entireties as to appearance.

*Id.*

Applicant further argues that "it is appropriate to consider whether a portion of the mark is dominant in creating the mark's commercial impression," *id.* at 8, and that "the fact that applicant's mark includes the term MUSHROOM as the initial term of the compound mark is one indicator that additional weight should be assigned to the term MUSHROOM in the present LOC analysis." *Id.*<sup>13</sup> Applicant also points to the "additional facts that the common term between the marks REVIVAL is highly suggestive and is used in a substantial number of similar marks on similar goods is an indicator that lesser weight should be assigned to the term REVIVAL in the present LOC analysis." *Id.*

With respect to sound, Applicant claims that its "compound mark clearly has a distinctive and dissimilar sound relative to that of the cited mark" because the "first word MUSHROOM in applicant's mark adds two syllables to the pronunciation of applicant's mark that are not present within the cited mark." *Id.* According to Applicant, the "fact that these two additional syllables (phonetically "mŭsh'rōōm")

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<sup>13</sup> Applicant uses "LOC" in its brief to abbreviate "likelihood of confusion." 6 TTABVUE 4.

are the initial syllables, emphasizes the dissimilarity of the marks in their entireties as to sound.” *Id.*

Finally, as to meaning, Applicant argues that its mark “includes the initial term MUSHROOM, being used with its dictionary definition; e.g., fungal growth” and “the cited mark does not include the term MUSHROOM. The absence of the term MUSHROOM in the cited mark points to a dissimilarity between the marks.” *Id.* at 7. Applicant claims that the cited mark, by contrast, “leverages the definition of the term REVIVAL to highly suggest a quality of the goods with which it is used.” *Id.*

Applicant also argues that the “term REVIVAL is found in a substantial number of USPTO registrations and applications,” claiming that of “the 684 records in the TESS database, about 300 of those records that include the term REVIVAL are currently live.” *Id.* at 7. Applicant claims that “the term REVIVAL is very often used in an expected, common, and suggestive way and therefore cannot be considered to be an arbitrary mark,” and that as “a highly suggestive term, the term REVIVAL should be considered to be a weak term and assigned less weight in the current LOC analysis.” *Id.* Applicant purports to invoke the sixth *DuPont* factor in arguing that a “review of U.S. trademark registrations using the term REVIVAL reveals numerous registrations that list products relating to the goods listed in the cited registration,” including “U.S. Reg. No. 4913551 for REVIVAL FOOD CO.; U.S. Reg. No. 6158100 for CHILE REVIVAL; U.S. Reg. No. 6707965 for REVIVAL LIVE YOUR BEST LIFE; U.S. Reg. No. 6591639 for PONO REVIVAL; U.S. Reg. No. 6277719 for REVIVAL ICE CREAM; U.S. Reg. No. 6117420 for REVIVAL TEA COMPANY; U.S. Reg. No.

5784519 for REVIVAL COFFEE ROASTERS; and U.S. Reg. No. 5785570 for REVIVAL FARMS.” *Id.* According to Applicant, “[t]hese registrations support a conclusion that the term REVIVAL should be considered to be a weak term and assigned less weight in the current LOC analysis.” *Id.*<sup>14</sup>

The Examining Attorney responds that the “only significant difference between the marks is the term MUSHROOM, which applicant has disclaimed” and which “has little or no trademark significance as it must be considered to be a highly descriptive, if not generic, term in relation to applicant’s goods” because it “identifies the primary component or ingredient of applicant’s ‘mushroom based dietary supplements in the form of capsules, liquid, powder.” 8 TTABVUE 4-5. The Examining Attorney argues that the “evidence of record confirms that providers of dietary supplements use the term MUSHROOM to denote a category or type of supplement product containing mushrooms or mushroom extracts.” *Id.* at 5 (citation omitted).

The Examining Attorney also argues that “Applicant’s arguments on the confusing similarity between the marks MUSHROOM REVIVAL and REVIVAL focus almost exclusively on the fact that the marks are not identical,” and argues that “marks do not need to be identical in every element in order for there to be a likelihood of confusion, and they may be confusingly similar in appearance where similar terms or phrases or similar parts of terms or phrases appear in the compared marks and

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<sup>14</sup> Third-party registrations unaccompanied by evidence of use go only to the conceptual weakness of a mark or an element of a mark, *Sabhnani*, 2021 USPQ2d 1241, at \*24, not the mark’s commercial strength, which is the focus of the sixth *DuPont* factor. Because Applicant discusses the third-party registrations in its discussion of the first *DuPont* factor, and provides no evidence of the use of the referenced marks, we will address this evidence under the first factor as well, even though Applicant claims that it implicates the sixth factor.

create a similar overall commercial impression.” *Id.* He further argues that in Applicant’s MUSHROOM REVIVAL mark, “the term MUSHROOM is less significant in terms of affecting the mark’s commercial impression, and renders the wording REVIVAL the more dominant element of the mark.” *Id.*

The Examining Attorney rejects Applicant’s argument that its addition of MUSHROOM to the word REVIVAL in the cited mark is sufficient to render the marks dissimilar because “the matter common to the marks is not merely descriptive or diluted” because “[t]he shared word ‘revival’ is defined as ‘an improvement in the strength or condition of something,’” and “does not describe any characteristics, features, qualities or properties of applicant’s or registrant’s nutritional and dietary supplements.” *Id.* at 6 (citations omitted). According to the Examining Attorney, “[a]t most, this term may be considered to be mildly suggestive as to unnamed potential benefits the users of these supplements could hope to achieve.” *Id.*

With respect to Applicant’s list of third-party registrations, the Examining Attorney argues that Applicant “has not made any evidence of record to support the contention that the mark REVIVAL. is, in fact, diluted,” but that “even if evidence of third party registrations had been made of record, third-party registrations are entitled to little weight on the issue of confusing similarity because the registrations are not evidence that the registered marks are actually in use or that the public is familiar with them.” *Id.* (quotations and quotation marks omitted).

The Examining Attorney concludes that

[a]ny vague suggestion of a promised improvement in one’s health that might be present with the REVIVAL. mark also

exists with the MUSHROOM REVIVAL mark. Both applicant and registrant use MUSHROOM REVIVAL and REVIVAL. as the trademarks for their supplement products. Consumers familiar with the registered mark REVIVAL. would, upon encountering applicant's MUSHROOM REVIVAL mark, be likely to presume that the supplement goods bearing this label are associated with and emanate from the same source as the REVIVAL. supplements.

*Id.* at 6-7.

The REVIVAL. and MUSHROOM REVIVAL marks must be considered in their entireties, but “in articulating reasons for reaching a conclusion on the issue of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties.” *Sabhnani*, 2021 USPQ2d 1241, at \*30 (quoting *Detroit Athletic Co.*, 128 USPQ2d at 1050 (quoting *In re Nat'l Data Corp.*, 753 F.2d 1056 , 224 USPQ 749, 751 (Fed. Cir. 1985)). As discussed above, Applicant and the Examining Attorney disagree as to the dominant portion of Applicant's MUSHROOM REVIVAL mark, so we will address that issue before turning to a comparison of the marks.

Applicant's arguments that MUSHROOM dominates its mark are based on the position of the word at the beginning of the mark and the claimed suggestiveness of the word REVIVAL that follows MUSHROOM. We agree with Applicant that the “first term in a compound mark is often considered to be the dominant portion of a compound mark,” 6 TTABVUE 6, but “this is not always the case, and disclaimed or descriptive terms may be considered less significant features of the mark, even when they appear first.” *Monster Energy*, 2023 USPQ2d 87, at \*32-33 (finding that the word

MONSTER dominated the applicant's mark ICE MONSTER and design for restaurant services). The nature of the words MUSHROOM and REVIVAL in Applicant's mark, and the mark's structure, "counsel[] against a reflexive application of [the] principle" that the first part of a mark is generally its dominant portion. *Sabhnani*, 2021 USPQ2d 1241, at \*37 (finding that the word MIRAGE was the more significant portion of the respondent's ROYAL MIRAGE word mark) (citing *Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014)).

The first word MUSHROOM in Applicant's mark MUSHROOM REVIVAL appears in Applicant's identification of goods and "has no source-identifying significance and has been disclaimed," *id.*, at \*33, because it describes the key ingredient of Applicant's goods. *Cf. In re TriVita, Inc.*, 783 F.3d 872, 114 USPQ2d 1574, 1575-76 (Fed. Cir. 2015) (affirming Board's finding that NOPALEA was merely descriptive of dietary supplements containing nopal juice because the proposed mark described the key ingredient of the supplements). It is well-settled that disclaimed, descriptive matter may have less significance in likelihood of confusion determinations because consumers will tend to focus on the more distinctive parts of marks. *See Detroit Athletic Co.*, 128 USPQ2d at 1050 (citing *In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997)); *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) ("Regarding descriptive terms, this court has noted that the 'descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.'")

(quoting *Nat'l Data Corp.*, 224 USPQ at 752); *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001) (disclaimed matter is often “less significant in creating the mark’s commercial impression”).

Nevertheless, Applicant argues that MUSHROOM should be given greater weight than REVIVAL in its mark because REVIVAL is “highly suggestive,” 6 TTABVUE 6, based on an unidentified dictionary definition of “revival” as “an improvement in the strength or condition of something,” and the third-party registrations of REVIVAL-formative marks listed in Applicant’s brief. *Id.* at 7. Neither the proffered dictionary definition nor the third-party registrations are in the record, but the Examining Attorney effectively treats them as if they were, as he adopts Applicant’s proffered definition of “revival” and argues that if the third-party registrations were of record, they are entitled to little weight. 8 TTABVUE 6. As a result, we will consider Applicant’s “evidence” for whatever probative value it may have. *Cf. In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1405 n.17 (TTAB 2018) (considering a list of third-party registrations because the examining attorney did not object to the list).

The cited mark REVIVAL. “is registered on the Principal Register without a claim of acquired distinctiveness and so is treated as inherently distinctive” for the goods identified in the registration.<sup>15</sup> *Monster Energy*, 2023 USPQ2d 87, at \*20. *See also Made in Nature, LLC v. Pharmavite LLC*, 2022 USPQ2d 557, at \*21 (TTAB 2022) (citing *Tea Bd. of India v. Republic of Tea, Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006)). The definition of “revival” as “an improvement in the strength or condition of

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<sup>15</sup> July 22, 2019 Office Action at TSDR 3-5.

something” referenced by Applicant and the Examining Attorney indicates that in the context of dietary supplements, the word may suggest that their use will improve the user’s health and well-being, but that does not show the conceptual weakness of REVIVAL in Applicant’s mark, much less that the descriptive word MUSHROOM, not the suggestive word REVIVAL, should be given greater weight in our analysis of the similarity or dissimilarity of the marks. The list of eight third-party registrations “does not include enough information to be probative,” *Peace Love World Live*, 127 USPQ2d at 1405 n.17, because it includes only the registration number and mark for each registration. “Because the goods are not listed, we do not know whether the listed registrations are relevant.” *Id.*<sup>16</sup>

We find that Applicant did not show that the word “revival” is conceptually weak for dietary supplements. Because REVIVAL is the only portion of Applicant’s MUSHROOM REVIVAL mark with any source-identifying capacity, we find that it is the dominant portion of the mark notwithstanding its second position in the mark. We turn now to the required comparison of the marks in their entirety, giving greater weight in that comparison to the noun REVIVAL in Applicant’s mark than to the adjective MUSHROOM.

“To state the obvious, [Applicant’s MUSHROOM REVIVAL mark] is similar to [the cited REVIVAL.] mark in that it incorporates the entirety of [the cited] mark,”

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<sup>16</sup> The marks REVIVAL FOOD CO, CHILE REVIVAL, REVIVAL ICE CREAM, REVIVAL TEA COMPANY, and REVIVAL COFFEE ROASTERS in the list of third-party registrations suggest, but do not specify, the goods covered by their registrations, but none of the suggested goods appear to involve supplements.

*Anheuser-Busch, Inc. v. Innvopak Sys. Pty Ltd*, 115 USPQ2d 1816, 1822-23 (TTAB 2015), with the exception of the period at the end of the cited mark, which Applicant itself has ignored in its brief. “Likelihood of confusion often has been found where the entirety of one mark is incorporated within another.” *Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, at \*6-7 (TTAB 2019) (finding ROAD WARRIOR and WARRIOR to be similar) (quoting *Hunter Indus., Inc. v. Toro Co.*, 110 USPQ2d 1651, 1660 (TTAB 2014)). “[I]f a junior user takes the entire mark of another and adds a generic, descriptive or highly suggestive term, it is generally not sufficient to avoid confusion.” *Id.*, at \*7 (citing *Stone Lion*, 110 USPQ2d at 1161 (affirming the Board’s finding that the applicant’s STONE LION mark for financial planning was confusingly similar to the opposer’s LION CAPITAL mark for competitive services)). The addition, in Applicant’s mark, of the descriptive word MUSHROOM to the mark REVIVAL. in the cited registration is not sufficient to avoid confusion here.

The fact that Applicant’s MUSHROOM REVIVAL mark is two words consisting of five syllables, while the cited mark is a single word consisting of three syllables, does not significantly differentiate the marks in appearance or sound because the Board has long held that consumers do not process this sort of minutia when forming their general impressions of marks. *See In re John Scarne Games, Inc.*, 120 USPQ 315, 316 (TTAB 1959) (“Purchasers of game boards do not engage in trademark syllable counting[;] they are governed by general impressions made by appearance or sound, or both.”). With respect to connotation, whatever may be the understood meaning of the word REVIVAL in the context of dietary supplements, the word has

the same meaning in each mark. *See Embiid*, 2021 USPQ2d 577, at \*21. MUSHROOM REVIVAL simply “looks, sounds, and conveys the impression of being a [mushroom-based] line extension” of the dietary supplements sold under the cited REVIVAL. mark. *Double Coin Holdings*, 2019 USPQ2d 377409, at \*7.

“Because the identified goods are identical . . . a lesser degree of similarity between the marks is required for confusion to be likely,” *Sabhnani*, 2021 USPQ2d 1241, at \*27 (citations omitted), but the marks are quite similar in appearance, sound, and connotation and commercial impression in any event. The first *DuPont* factor supports a finding of a likelihood of confusion.

### **C. Purchase Conditions and Consumer Sophistication**

In addition to the identification of the purchasers to whom sales of the involved goods are made, the “fourth *DuPont* factor also considers “[t]he conditions under which . . . sales are made, i.e., impulse vs. careful, sophisticated purchasing.” *Embiid*, 2021 USPQ2d 577, at \*31 (quoting *DuPont*, 177 USPQ at 567).

Applicant argues that

It is the applicant’s experience that buyers of applicant’s products do not make impulse purchases and on the contrary are sophisticated purchasers who seek natural, mushroom based products for defined health benefits. Applicant’s website provides substantial background information pertaining to applicant’s products by design. Applicant’s clientele desires such information as part of their buying practices. Hence, it is respectfully submitted that the purchasers of applicant’s products overwhelmingly tend to be people – sophisticated purchasers - who desire natural mushroom based products as an alternative to other products available on the market.

6 TTABVUE 11.

There are two fatal problems with Applicant's reliance on its "experience." First, "we have only the assertions of Applicant's counsel in its brief," *In re Int'l Fruit Genetics, LLC*, 2022 USPQ2d 1119, at \*35 (TTAB 2023), and as the Board has stated repeatedly, "[a]ttorney argument is no substitute for evidence." *In re Netxgen Mgmt., LLC*, 2023 USPQ2d 14, at \*4 (TTAB 2023) (quoting *Cai*, 127 USPQ2d at 1799). *Cf. In re U.S. Tsubaki, Inc.*, 109 USPQ2d 2002, 2006 (TTAB 2014) ("Putting aside whether a declaration from outside counsel could ever qualify as acceptable proof of these sort of facts, we have here no foundational information about counsel's investigation of, or understanding of, applicant's business, that would put him in a position to make statements regarding the marketing of the products at issue, which in this case is essential to our analysis of the registrability of the mark.").

Second, even if Applicant's assertions were supported by record evidence, we are not concerned with "Applicant's clientele" per se, but rather with all potential consumers of "Mushroom based dietary supplements in the form of capsules, liquid, powder." *Stone Lion*, 110 USPQ2d at 1323-35 (holding that under the fourth *DuPont* factor, "the Board properly considered *all* potential investors for the recited [financial and investment] services, including ordinary consumers seeking to invest in services with no minimum investment requirement," even though the parties agreed that their current customers were sophisticated) (emphasis in original). The Federal Circuit noted in *Stone Lion* that "Board precedent requires the decision to be based 'on the least sophisticated potential purchasers.'" *Id.* at 1325 (quoting *Gen. Mills, Inc. v. Fage Dairy Proc. Indus. S.A.*, 100 USPQ2d 1584, 1600 (TTAB 2011), *judgment set*

*aside on other grounds*, 2014 WL 343267 (TTAB Jan. 22, 2014)). *Cf. Made in Nature*, 2022 USPQ2d 557, at \*51-55 (because the identifications of the food and beverage products in the parties' registrations and application did not contain any limitations regarding classes of consumers, the "prospective purchasers for the parties' identified products include a variety of consumers, including consumers that do not have significant knowledge or experience with these food and beverage products," and who would not purchase with more than ordinary care).

There is nothing in the record showing that the least sophisticated potential consumers of "Mushroom based dietary supplements in the form of capsules, liquid, powder" are likely to exercise anything more than ordinary care in purchasing.<sup>17</sup> This portion of the fourth *DuPont* factor is neutral in our analysis of the likelihood of confusion.

#### **D. The Eighth *DuPont* Factor**

The eighth *DuPont* factor "considers the 'length of time during and conditions under which there has been concurrent use without evidence of actual confusion.'" *Made in Nature*, 2022 USPQ2d 557, at \*56 (quoting *DuPont*, 177 USPQ at 567).

As Applicant acknowledges, "evidence of actual confusion is not required to establish a LOC," 6 TTABVUE 11, and its absence "is meaningful only if the record indicates appreciable and continuous use by [Applicant] of its mark for a significant

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<sup>17</sup> We note that the record shows that dietary supplements, including mushroom-based supplements, include modestly priced goods that may be purchased online. July 22, 2019 Office Action at TSDR 22-30; November 29, 2021 Final Office Action at TSDR 7-12; May 13, 2022 Denial of Request for Reconsideration at TSDR 4-18.

period of time in the same markets as those served by [the cited registrant] under its mark[ ].” *Made in Nature*, 2022 USPQ2d 557, at \*56 (quoting *Citigroup Inc. v. Cap. City Bank Grp. Inc.*, 94 USPQ2d 1645, 1660 (TTAB 20110), *aff’d*, 637 F.3d 1344, 98 USPQ2d 1253, 1258-59 (Fed. Cir. 2011)). “In other words, for the absence of actual confusion to be probative, there must have been a reasonable opportunity for confusion to have occurred.” *Id.* (citing *Barbara’s Bakery Inc. v. Landesman*, 82 USPQ2d 1283, 1287 (TTAB 2007)).

“As noted above, our analysis of the second, third, and fourth [*DuPont*] factors, discussing the similarity or dissimilarity of the [goods], channels of trade, and relevant consumers, is based, as dictated by precedent from the Federal Circuit, on the identifications **as set forth** in the” cited registration and application. *Sabhnani*, 2021 USPQ2d 1241, at \*47 (quoting *In re Guild Mortg. Co.*, 2020 USPQ2d 10279, at \*6 (TTAB 2020) (emphasis in *Guild Mortg.*)). By contrast, the eighth *DuPont* “requires us to look at **actual market conditions**, to the extent there is evidence of such conditions in the record.” *Id.*, at \*47-48 (quoting *Guild Mortg.*, 2020 USPQ2d 10279, at \*6 (emphasis in *Guild Mortg.*)).

There is no evidence of actual market conditions in the record here. Applicant merely argues that “it should be noted that in the four years that the applicant has been using the mark MUSHROOM REVIVAL, applicant is not aware of any actual confusion that has occurred.” 6 TTABVUE 11 (emphasis supplied by Applicant). The eighth *DuPont* factor is also neutral in our analysis of the likelihood of confusion.

### **E. Summary**

The first, second, and third *DuPont* factors all support a finding of a likelihood of confusion, while the fourth and eighth *DuPont* factors are neutral. The goods, channels of trade, and classes of consumers are identical, the REVIVAL. and MUSHROOM REVIVAL marks are quite similar, and the cited REVIVAL. mark is not conceptually weak, but rather is entitled to the “normal scope of protection to which [an] inherently distinctive mark[] is entitled.” *Sabhnani*, 2021 USPQ2d 1241, at \*26 (quoting *Bell’s Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1347 (TTAB 2017)). We find, on the basis of the record as a whole, that consumers familiar with the cited mark REVIVAL. for “dietary supplements which contain vitamins, minerals and herbs” who separately encounter Applicant’s MUSHROOM REVIVAL mark for “Mushroom based dietary supplements in the form of capsules, liquid, powder” are likely to believe mistakenly that Applicant’s goods are a mushroom-based line extension of the cited registrant’s REVIVAL. dietary supplements.

**Decision:** The refusal to register is affirmed.